FILED
MAY 8 1970
JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969

No. 1548

JOSEPH MAIORANI,
Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,
Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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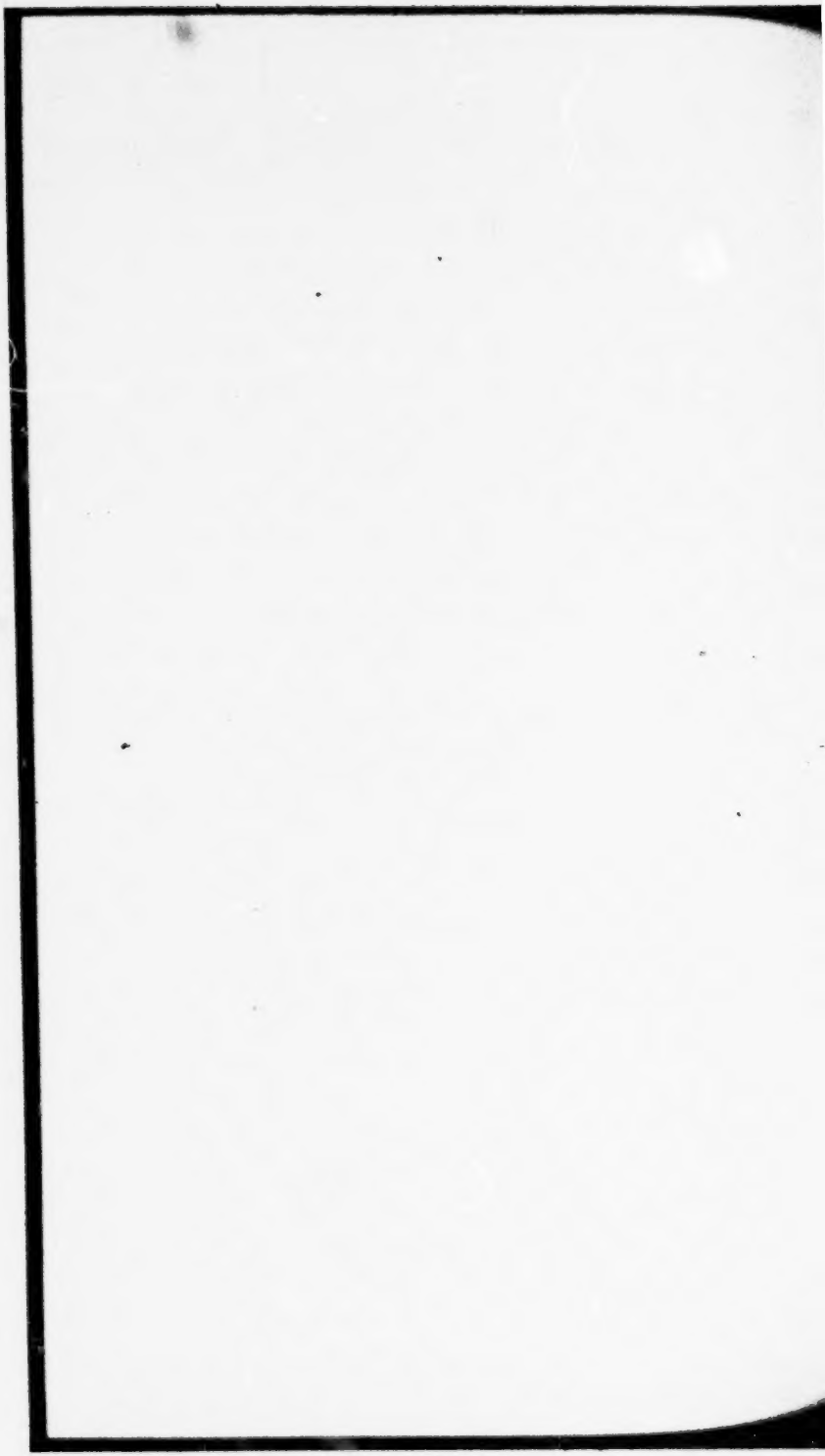

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IN THE
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OCTOBER TERM, 1969

No.

JOSEPH MAIORANI,

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PITTSTON STEVEDORING CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on January 30, 1970.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, F.2d and the opinion and order of the United States District Court for the Southern District of New York (MacMahon, D.J.) denying petitioner's motion pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure to vacate the judgment are printed in full as part of the appendix to this petition. The action was originally dismissed by Hon. Lloyd F. MacMahon from the Bench when the case was called for trial.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 30, 1970. A petition for rehearing and rehearing in banc was filed which petition was denied by orders dated February 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTION PRESENTED

Is a cause of action which has been diligently prosecuted until it is reached for trial subject to dismissal on the merits if plaintiff's counsel fails to personally attend by reason of other legal engagement when the Clerk of the Court gives one and one-half hours notice to appear for trail?

REASONS FOR GRANTING THE WRIT

Every lawyer is subject to call in more than one case for the same time which places every litigant throughout the country in every case in danger of losing his day in Court on the merits by reason of conflicting Court commitments of his attorney.

The protection of this Court is sought to prevent such injustice.

The decision by the Court below exposes every litigant in our Federal Courts to the loss of his day in Court on technical grounds over which neither the litigant nor his attorney has control.

STATEMENT OF THE CASE

On the 21st day of March, 1963, petitioner was operating a hi-lo in the #2 hold of the M.S. KAMIKAWA MARU when the steering wheel suddenly went out of control, causing injuries to petitioner's right hand (A 37).*

The aforementioned accident was caused by the deck being encumbered by timbers, one of which wedged into the rear wheel of the hi-lo (the rear wheels being the part of the hi-lo which controls the steering), causing the steering wheel to spin and the accident to occur as described (A 36-37).

The case worked itself up the Jury Personal Injury Calendar of the United States District Court for the Southern District of New York until it reached the position of being #3 of the "pool calendar" on the 21st day of March, 1969 (A53).

On or about that date, petitioner's counsel applied for an adjournment until April 15, 1969 based on the fact that he was scheduled to try a case in Panama and that defense counsel expected to be out of New York from April 3rd to April 11th, 1969. The request for adjournment was based on stipulation of all counsel concerned and was so ordered by

---

* References are to pages in Petitioner's Appendix in the United States Court of Appeals.

District Judge Pollack. The stipulation is set forth below in full:

[TITLE]

"U.S. Dist. Court
Filed Apr. 15, 1969
SD of NY

65 Civ. 3169
STIPULATION

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties hereto that an order may be entered adjourning the above entitled action to April 15, 1969, to hold its place on the Ready Day Calendar of the Civil Trial Pool without further notice.

Dated: New York, N.Y.
March 21, 1969.

S/JACOB RASSNER
S/KIRLIN, CAMPBELL & KEATING
S/FOLEY, GRAINGER & DARBY

SO ORDERED: Mar. 25, 1969.
S/ MILTON POLLACK,
U.S.D.J."

It should be noted that this case was to hold its place on the calendar of April 15, 1969. That is, it was to appear as case No. 3. It was not actually scheduled for trial that day.

The heading which is printed in the New York Law Journal above the jury trial pool list reads in part as follows:

"The cases listed below are assigned to a Jury Trial Pool . . . to be tried one to follow the other in the order

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listed before any Judge of the Court. . . . . ."

On April 15, 1969, the Clerk telephoned all counsel at 10:00 a.m. and directed them to appear for trial at 11:30 a.m. (A 54).

As petitioner's counsel had not received a call on April 14th for trial on April 15th, he went to Mobile, Alabama to attend a deposition with expected return to New York the night of April 15th (A 31-32).

Petitioner, who had been instructed to keep in daily contact with counsel's office, had telephoned on April 14th and was told by someone in counsel's office to call back the next day, that is, April 15th for further instructions (A 38).

George G. Kilarjian, Esq., an associate of Mr. Rassner, appeared before Judge MacMahon on April 15th, explained the circumstances and requested a short adjournment, which request was denied and the case dismissed.

A motion pursuant to Rule 60 (b) of the Federal Rules of Civil Procedure for an order vacating the order of dismissal was made which motion was denied.

ARGUMENT

The Court below cited and apparently relied on the case of *Link v. Wabash Railroad Company,* 370 U.S. 626, 82 S. Ct. 1386 (1962) in reaching its decision.

The facts in the *Link* case, supra, warranted a dismissal by reason of "earlier delays" as well as the failure of plaintiff's counsel to appear, which is diametrically contrary to the facts in the case at bar.

This Court stated the basis of the dismissal in the following language which appears at page 634:

> "We need not decide whether unexplained absence from a pretrial conference would *alone* justify a dismissal with prejudice if the record showed no other evidence of dilatoriness on the part of plaintiff. For the District Court in this case relief on *all* the circumstances that were brought to its attention, including the earlier delays.[11]" (Emphasis supplied)

The denial to petitioner in the instant case of a trial on the merits was based on a failure to appear on one occasion after one and a half hours notice by the Clerk, while petitioner's counsel was actually engaged for one day in a deposition at Mobile, Alabama in a case pending in the Southern District of New York. The instant case was #3 on the calendar for that day.

There were no earlier delays occasioned by the petitioner or petitioner's counsel. The action was diligently prosecuted and petitioner himself was actually ready to proceed to trial.

There was not the slightest evidence of dilatoriness on the part of petitioner or failure to prosecute on the part of petitioner's counsel.

Common sense and logic justified petitioner's counsel's opinion that he would have plenty of time to conclude the deposition before the Trial Court finished two prior cases.

The *Link* case, supra, cited by the Court below in support of its decision expresses a view in conflict with the decision by this Court, which has expressly stated that facts such as in the instant case would not alone justify a dismissal.

In the case of *Napolitano v. Compania Sud-Americana de Vapores,* (docket #33960-33961, decided January 26, 1970),

the United States Court of Appeals for the Second Circuit considered another decision by District Judge MacMahon which was somewhat similar to the case at bar. In that case, the Court stated:

> "Moreover, we do not think it amiss to indicate that if these recurrent occurrences which to date we have been constrained to view as not being abuses of discretion continue to recur we may find it necessary to consider wuch a pattern of conduct as detrimental to the administration of justice despite a trial judge's conscientious belief that he is facilitating it."

The imperative need for this Honorable Court's consideration of the question presented is highlighted by the foregoing observation by the lower Court calling for restraint in dismissing cases followed by inactivity in enforcing its suggested restraint when trial on the merits is denied.

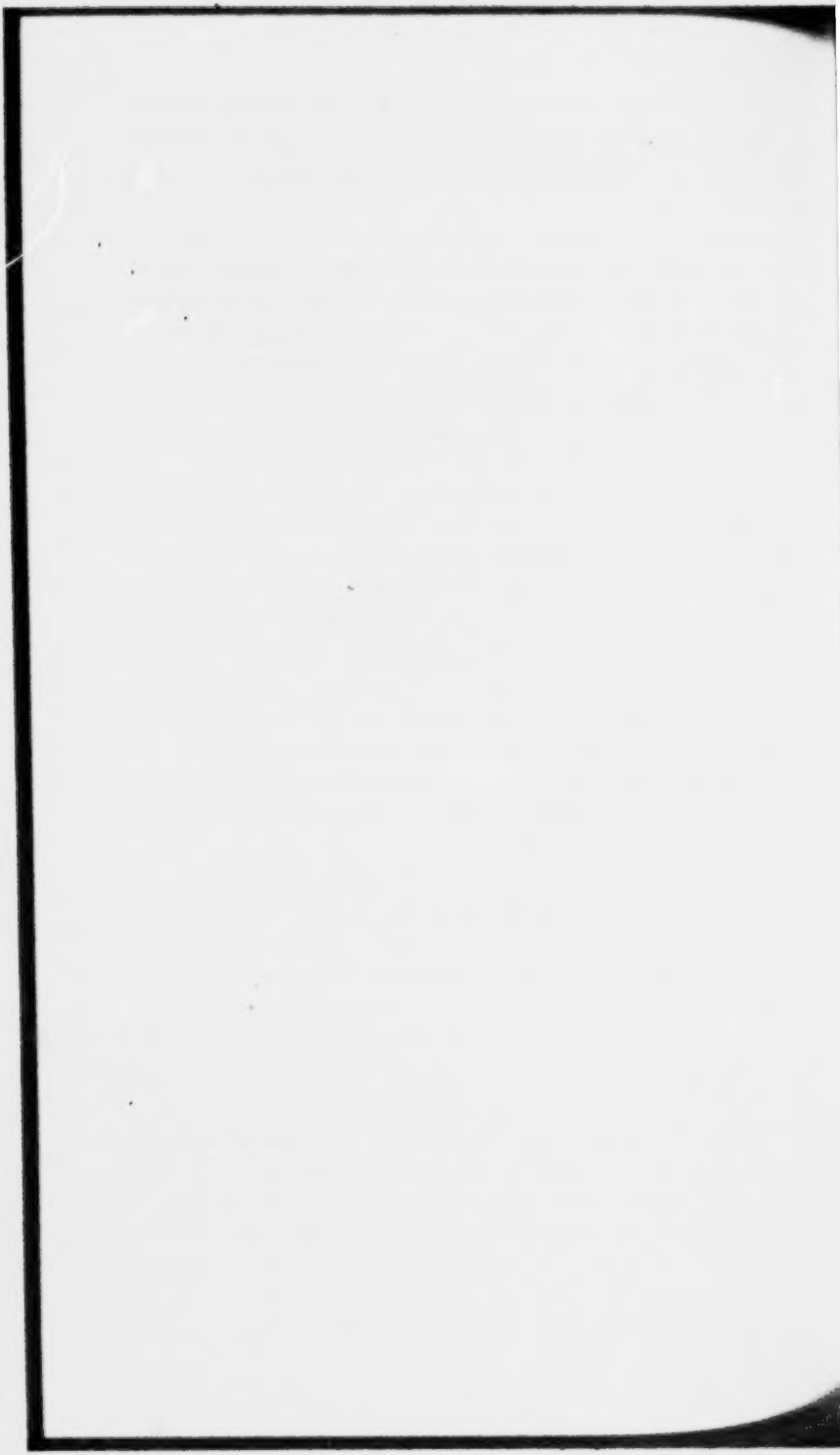
In the light of the expression by this Court in *Link*, supra, a denial of a trial on the merits under the circumstances set forth and the importance of the question involved, it is respectfully submitted that this case should be reviewed by this Honorable Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JACOB RASSNER
Attorney for Petitioner



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APPENDICES

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Appendix E - Opinion and Order of United States District Court for Southern District of New York . E-1

APPENDIX A

33487

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Joseph Mairorani,
Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,
Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,
Third-Party Defendant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Leonard P. Moore

Henry J. Friendly

February 24, 1970

Circuit Judges

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APPENDIX B

33487

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Joseph Maiorani,

Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,

Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,

Third-Party Defendant.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff- appellant and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petiton be and it hereby is denied.

J. EDWARD LUMBARD

Chief Judge

February 24, 1970

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
S E C O N D C I R C U I T

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirtieth day of January one thousand nine hundred and seventy.

Present:

HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
HON. PAUL R. HAYES,

Circuit Judges.

- -

Joseph Maiorani,

Plaintiff-Appellant,

v.

Kawasaki Kisen K.K. Kobe,

Defendant and Third-Party
Plaintiff-Appellant,

Pittston Stevedoring Corp.,

Third-Party Defendant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the appellant, Joseph Maiorani.

A. DANIEL FUSARO
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 479—September Term, 1969.

(Submitted January 21, 1970 Decided January 30, 1970.)

Docket No. 33487

JOSEPH MAIORANI,

Appellant,

—against—

KAWASAKI KISEN K. K., KOBE,

Appellee and Cross Appellant,

—against—

PITTSTON STEVEDORING CORPORATION,

Appellee.

Before:

MOORE, FRIENDLY and HAYS,

Circuit Judges.

Appeal from orders of the District Court for the Southern District of New York, Lloyd F. MacMahon, *Judge,* dismissing a longshoreman's personal injury action against a shipowner for want of prosecution and refusing to set the dismissal aside. Affirmed.

JACOB RASSNER, Esq., New York, New York (Bernard Shafter, Esq., New York, New York, of Counsel), *for Appellant.*

DANIEL J. DOUGHERTY, Esq. (Kirlin Campbell & Keating, New York, New York and James R. Campbell, Esq., of Counsel), *for Appellee and Cross-Appellant.*

JOSEPH GRAINGER, Esq. (Foley, Grainger & Darby, New York, New York, of Counsel), *for Appellee.*

PER CURIAM:

Plaintiff, a longshoreman, appeals from orders dismissing his personal injury action against a shipowner for want of prosecution and refusing to set the dismissal aside. The facts that occasioned the dismissal are stated in detail in an opinion of Judge MacMahon; we limit ourselves to the essentials:

The injury occurred in March, 1963. Action was brought on October 21, 1965. A pretrial order was entered on August 8, 1968, and the case was placed on the ready calendar. Commencing February 5, 1969, the case appeared in the New York Law Journal as in the jury trial pool, below a notice warning that "this calendar moves very rapidly" and that "attorneys are directed to be ready to proceed to trial upon a telephone call from the Deputy Clerk." See Calendar Rule 8(b). When the case had advanced to Number 3, plaintiff's lead counsel, Jacob Rassner, Esq., applied on March 21 for an adjournment because he would be engaged in litigation outside the United States from March 24 to March 31. Upon a stipulation that an order might be entered adjourning the action "to

April 15, 1969, to hold its place on the Ready Day Calendar of the Civil Trial Pool . . .," the judge in charge of the jury trial pool granted the application, and the deputy clerk advised counsel that the case would be tried on April 15 or very shortly thereafter. The deputy clerk telephoned them at 10:00 A.M. on April 15 and directed them to appear for trial at 11:30 A.M. The case was called at 12:15 P.M.; counsel for the shipowner and the impleaded stevedore were present and ready. An attorney from Mr. Rassner's office sought a two-day adjournment because Mr. Rassner had gone to Mobile, Alabama, to take a deposition in another case. When the judge indicated that plaintiff must proceed or have his action dismissed, the attorney stated he was not prepared to try the case. There followed an order of dismissal, which the judge later declined to vacate.

On these facts we perceive no abuse of discretion by the trial judge, quite apart from his further finding that a review of the files showed there were other attorneys who had acted for plaintiff and could have conducted the trial. Counsel, who had been once accorded the courtesy of an adjournment because of a conflicting professional engagement, was on notice that the action would be reached for trial on April 15 or shortly thereafter. He deliberately absented himself without any request for a further adjournment under Calendar Rule 7(b)(1). When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights too, and the client is not without a remedy. *Link* v. *Wabash R.R.*, 370 U.S. 626, 634 n. 10 (1962).

Affirmed.

APPENDIX E

Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -

JOSEPH MAIORANI,

Plaintiff,

-against-

KAWASKI KISEN K.K. : KOBE,

Defendant and Third-Party Plaintiff,

-against-

PITTSTON STEVEDORING CORP.,

Third-Party Defendant.

65 Civ. 3169

Copy No. 35921

U.S. District Court
FILED
JUN 5 1968
10:30 AM
S.D. OF N.Y.

- -

MacMAHON, District Judge.

Plaintiff moves under Rule 60(b), Fed. R. Civ. P., to vacate and set aside a judgment entered against him for failure to prosecute. Rule 41(b), Fed. R. Civ. P.

This action arises from a superficial injury to plaintiff's right hand which he claims to have suffered on board defendant third-party plaintiff's vessel on March 21, 1963.

The action was commenced on October 21, 1965, two years and seven months after the accident. After a delay of another two years, counsel certified that the action was ready for trial[1] and placed it on the trial calendar on August 4, 1967. After still another year's delay, a pretrial order was entered on August 8, 1968, and the action was placed on the ready calendar. The case was assigned to the jury trial pool on January 30, 1969. Commencing on February 5, 1969, it appeared in the New York Law Journal as case number 28 in the pool, below a notice which read as follows:

> "The cases listed below are assigned to a Jury Trial Pool ... to be tried one to follow the other in the order listed before any judge of the Court. This calendar moves very rapidly. Attorneys are directed to be ready to proceed to trial upon a telephone call from the Deputy Clerk, who will notify attorneys when and where to appear."

When this case had advanced to Number 3 in the pool, Jacob Rassner, Esq., plaintiff's counsel, applied on March 21, 1969 for an adjournment because he would be engaged in litigation outside the United States from March 24 to March 31, 1969. Judge Pollack, who was in charge of the jury trial pool in March 1969, granted the application and adjourned the case until April 15, 1969, the date Mr. Rassner requested, presumably because he had no conflicting engagements and would not subsequently become otherwise engaged on that date. When the Deputy Clerk informed Mr. Rassner that the case had been adjourned, the Clerk made it clear that the case would be tried on April 15, 1969 or very shortly thereafter.

The Deputy Clerk telephoned all counsel on April 15, 1969, at 10:00 A.M., and directed them to appear before us for trial at 11:30 A.M. When the case was called at 12:15 P.M., counsel for defendant third-party plaintiff and third-party defendant were present and ready for trial.

Plaintiff's counsel, however, did not appear. Instead an attorney from his office, George G. Kilarjian, Esq., appeared and applied for yet another adjournment, because now Mr. Rassner was taking a deposition in Mobile, Alabama. Mr. Kilarjian then informed us that he was not prepared to try the case. Defendant third-party plaintiff moved to dismiss, and we granted the motion.

Three attorneys submit affidavits on plaintiff's behalf. They contend: (1) that plaintiff was forced to go to trial on one hour's notice; (2) that only Mr. Rassner was able to try the case and (3) that plaintiff has no other redress for the underlying meritorious claim.

As to the first contention, that plaintiff was forced to go to trial on one hour's notice, plaintiff argues that the Calendar Rules of this Court provide for twenty-four hours' notice prior to trial. As we have explained on many other occasions,[2] Calendar Rules 6(d) and 7(b)(1), which mandate that cases be ready to proceed on twenty-four hours' notice, apply only to the movement of a case from the Ready Day Calendar to a judge's trial calendar or to a jury pool. Once a case is placed on a judge's trial calendar or in the pool, counsel are not entitled to twenty-four hours' notice but only to such notice as enables them to reach Court in time for trial.[3] The rules of this Court, coupled with the notice published in the Law Journal, put counsel on notice to be prepared to commence trial forthwith upon receiving telephonic notice. The alternative to the courtesy of telephone notice is to require counsel, parties and witnesses to come to the Courthouse and wait there until the case is reached, so that judges and juries will be kept employed moving this Court's congested calendar, instead of sitting around idly waiting for counsel, parties and witnesses.

Counsel's assertion that he received only one hour's notice is simply untrue. Mr. Rassner, himself, more than three

weeks before April 15, 1969, requested that the case be adjourned to the head of the jury trial pool for April 15, where, as the notice plainly reads, it could be reached on that date or shortly thereafter. The Deputy Clerk, also, orally informed Mr. Rassner's office that the case would be tried on April 15 or shortly thereafter. These uncontroverted facts make clear that Mr. Rassner had much more than one hour's notice; in fact, he had more than three weeks' notice.

The second contention, that Mr. Rassner was the only attorney able to try this case, is not in accord with the record facts. A review of the file reveals the names of four attorneys, other than Mr. Rassner, who were involved in this case and either purported to have, or evidenced, a working knowledge of the facts of this rather routine case.

The designation of trial counsel, for example, listed "Jacob Rassner or one of his associates." Bernard Shafter, Esq. appears on a number of papers as the attorney for plaintiff and prepared discovery motions on plaintiff's behalf. These motions were made on the basis of affidavits submitted by yet another attorney, Ernest Rassner, Esq. The affidavits evidence a great deal of familiarity with the facts. Mr. Kilarjian appeared on the day of trial and subsequently filed affidavits in support of the instant motion. Finally, Alfred Shafter, Esq. claims that he is presently plaintiff's attorney. We must, therefore, reject the argument that Mr. Rassner was the only attorney who could try this case.

The third contention, that our dismissal leaves plaintiff without a remedy for the underlying meritorious claim, is also rejected. There are some 12,000 other litigants, civil and criminal, awaiting trial in this Court, some of them sitting in jail, and their right to a speedy trial is being jeopardized, if not denied, by delay occasioned by attorneys "otherwise engaged" or parties eager to postpone indefinitely the day of reckoning.

We realize that dismissal is a harsh sanction,[4] but if we seriously intend to effectuate the right to a speedy trial and to realize our goal of current callendars, then we must enforce the rules of this Court.[5]

Plaintiff is not without a remedy. Where "an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice."[6]

Accordingly, plaintiff's motion to vacate and set aside the judgment entered against him is denied.

So ordered.

Dated: New York, N.Y.
June 4, 1969

/s/ Lloyd F. MacMahon

United States District Judge

FOOTNOTES

[1]See Calendar Rule 5.

[2]*Quagliano v. United States,* 293 F. Supp. 670 (S.D.N.Y. 1968); *Vitarelle v. Long Island R.R.,* 45 F.R.D. 474 (S.D.N.Y. 1968).

[3]Calendar Rule 8(b).

[4]*Schwarz v. United States,* 384 F.2d 833, 836 (2d Cir. 1967).

[5]See *Davis v. United Fruit Co.,* 402 F.2d 328 (2d Cir. 1968), *cert. denied,* 393 U.S. 1085 (1969).

[6]*Link v. Wabash R.R.,* 370 U.S. 626, 634 n. 10 (1962).

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—against—

PITTSTON STEVEDORING CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT P. WHELAN
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IN THE

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POINT I

The Matter, Being Procedural, Already Affirmed by the Court of Appeals, Is Not Subject to Review by Writ of Certiorari.

While on occasion, the Supreme Court will grant certiorari on procedural or evidentiary matters which, for example, would have universal bearing on the administration of criminal justice, *Jencks* v. *United States*, 353 U.S. 657, or to civil litigation in the federal courts, *Sibach* v.

Wilson v *Co., Inc.*, 312 U.S. 1, or to the construction and application of a specific Federal Rule of Civil Procedure, *Schlagenhauf* v. *Holder*, 379 U.S. 104, ordinarily those matters which deal with the interpretation of adjective, or procedural law are left to the discretion and interpretation of the lower courts. 36 Corpus Juris Secundum, Federal Courts, Sec. 204 (17), page 664.

This is especially so when the action of the District Court has been affirmed by the Court of Appeals, *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, 4 L. Ed. d 30, 80 Sup. Ct. 16 (cf. 379 U.S. 829).

As stated in *Palermo* v. *United States*, 360 U.S. 343, at page 353:

> ". . . Final decision as to production must rest, *as it does so very often in procedural and evidentiary matters* (italics added), within the good sense and experience of the district judge guided by the standards we have outlined, and subject to the appropriately limited review of appellate courts."

Nothing could be more procedural or more local than a District Court's disposition of its own cases. The power is both ancient in origin and inherent in nature. *Link* v. *Wabash Railroad Co.*, 370 U.S. 326; *American Pipe & Construction Co.* v. *Pence*, 9 Cir., 393 F. 2d 568, certiorari denied, 393 U.S. 842.

As stated in *CMAX* v. *Hall*, 9 Civ., 300 F. 2d 265, at page 268:

> "A district court has inherent power to control the disposition of the causes on its docket in a manner which will promote economy of time and effort for itself, for counsel and for litigants. The exertion of this power calls for the exercise of a sound discretion."

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There can be no question that the district courts, Rule 83, Fed. Rule Civ. Proc. 28 U.S.C.A., as well as the Supreme Court, 28 U.S.C.A. 2072, has the power to make rules governing its own practice. The rules in question were such rules. It will be noted that both the Court of Appeals (Pet's App. D-3) and the District Court (App. E-3) found that, besides the lack of proper procedure for adjournment by the plaintiff under these rules, there were other persons who could have acted as substitutes, all of which would have made it unnecessary for plaintiff to even consider having to conform to such procedure in the first instance.

POINT II

The Petition Should Not Be Entertained in any Event.

As heretofore noted, when a court of appeals concurs with the district court, certiorari is not ordinarily granted, *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, supra; cf. 36 Corpus Juris Secundum, Federal Courts, Sec. 204 (21), page 669.

In addition, there is clear precedent for the determination of the said two lower courts, *Link* v. *Wabash Railroad Co.*, 370 U.S. 626.

In the cited case the failure to appear was only a pretrial. Plaintiff was unrepresented when the dismissal was ordered. In this case, the trial was about to commence and the plaintiff was represented (App. E-3). More than dilatoriness, or want of prosecution, there was refusal.

Respectfully submitted,

ROBERT P. WHELAN
Attorney for Respondent,
Pittston Stevedoring Corp.

JUN 5 1970

JOHN F. DAVIS, CLERK

IN THE

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October Term 1969

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Respondent.

BRIEF OF RESPONDENT KAWASAKI KISEN K.K. KOBE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

ROBERT P. HART
Counsel for Respondent
120 Broadway
New York, N. Y. 10005

DANIEL J. DOUGHERTY
CHARLES N. FIDDLER
of Counsel

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PITTSTON STEVEDORING CORPORATION,

Respondent.

BRIEF OF RESPONDENT KAWASAKI KISEN K.K. KOBE, IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent opposes the granting of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated January 30, 1970, on the ground that the decision was correct and does not involve any question warranting consideration by this Court.

Facts and Question Presented

The United States District Court for the Southern District of New York dismissed this personal injury action on April 15, 1969, for failure to prosecute. Plaintiff moved to set aside the judgment and the District Court, in an opinion dated June 4, 1969, declined to do so.

Plaintiff appealed to the Second Circuit Court of Appeals, which affirmed in an opinion decided January 30, 1970. Plaintiff then petitioned for a rehearing; and for a rehearing containing a suggestion the action be reheard *in banc*. Both petitions were denied on February 24, 1970.

This question is now presented: should the United States Supreme Court review all of this discretionary judicial action?

Reasons for Denying the Writ

It is not the practice of our Supreme Court to review matters of discretion, particularly where the Circuit Court has found there has been no abuse of discretion.

Plaintiff's own brief in the Circuit Court formulates the appellate issue thus (quoting in full from his brief, page 4):

"QUESTION PRESENTED

> "Did Judge MacMahon abuse his discretion by dismissing the action on April 15, 1969 and by refusing to set the judgment aside on appellant's motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure."

Respondent agrees that was the Circuit Court issue.

The Circuit Court wrote (see page D-3 of Petitioner's Appendix):

> "On these facts we perceive no abuse of discretion by the trial judge, quite apart from his further finding that a review of the files showed there were other attorneys who had acted for plaintiff and could have conducted the trial."

Petitioner has shown no conflict in decisions between or among the circuits; and he has raised no federal question.

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Argument

Petitioner has created a classic "straw man", anent the case of *Link* v. *Wabash R.R.*, 370 U.S. 626. Petitioner says the Circuit Court "apparently relied on (that) case" (page 5 of his brief).

Although *Link* v. *Wabash* does not require support from or justification by this respondent, let us nevertheless, for the sake of accuracy, focus on the treatment given *Link* by both lower courts. We quote from the District Court opinion (p. E-5 of Petitioner's appendix):

> "Plaintiff is not within a remedy. Where 'an attorney's conduct falls substantially below what is reasonable under the circumstances, *the client's remedy* is against the attorney in a suit for malpractice.' " (Citing *Link* v. *Wabash R.R.*, 370 U.S. 626, *634 n. 10* (1962). (Emphasis added to text and citation.)

Next, we quote from the Circuit Court opinion (p. D-3 of Petitioner's appendix):

> "He deliberately absented himself without any request for a further adjournment under Calendar Rule 7(b)(1). When a case has reached this stage, counsel cannot make himself unavailable, even temporarily, without providing a stand-by, as the trial judge thought he in fact had done. Opposing counsel, their witnesses, and parties to other cases awaiting trial have rights too, and *the client is not without a remedy. Link* v. *Wabash R.R.*, 370 U.S. 626, *634 n. 10* (1962)." (Emphasis added to text and citation.)

It is hence seen that *Link* was cited for the limited, above-quoted principle.

The dismissal in the case before this Honorable Court was premised upon much broader bases: (a) primarily the *facts* of the case; (b) the exercise of judicial discretion

which was reviewed by the district court on motion and by the circuit court on appeal; (c) the applicability of case law including but not limited to *Link* v. *Wabash*; and (d) the applicability of the Federal Rules of Civil Procedure and of local, district court calendar rules.

Second Circuit decisions are unanimous in upholding the trial judge's power to exercise discretion in alleviating calendar congestion. Certiorari was recently denied in an analogous case concerning the denial of a trial adjournment, *Davis* v. *United Fruit*, 402 F. 2d 328, certiorari denied, 393 U.S. 1085.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT P. HART,
Counsel for Respondent,
Kawasaki Kisen K.K. Kobe.

DANIEL J. DOUGHERTY,
CHARLES N. FIDDLER,
of Counsel.

June 3, 1970.

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JUN 11 1970

JOHN F. DAVIS, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969
No. 1548

JOSEPH MAIORANI,

Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,

Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,

Respondent.

REPLY BRIEF

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IN THE
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Respondent.

BRIEF IN REPLY TO THE BRIEFS SUBMITTED BY RESPONDENTS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Both briefs submitted in opposition to the petition for a writ of certiorari in the above matter completely sidestep the basis for the petition.

Pursuant to the decision below, an attorney would be subjected to an action for malpractice if called to two Courts at the same time.

Under those circumstances, it would be necessary for him to miss one or the other engagement and a busy practitioner would find himself in a situation where he would be constantly subjected to a malpractice action.

This, obviously, affects almost every attorney engaged in practice before our Courts. It involves a grave and basic concept of practice.

The zeal for a well balanced calendar must be balanced against the meting out of justice to litigants coming before the Court.

The case of *Flaksa v. Little River Marine Construction Co.*, 389 F. 2d 885 (1968), decided by the United States Court of Appeals for the Fifth Circuit, on February 8, 1968, discussed the legal concept involved in a comprehensive and enlightened manner. In that case, an action was dismissed for failure of counsel to appear at a pretrial conference after a long history of delays. The Court there stated:

(page 886)

"The basis for the order was that appellant's proctor had "failed to abide by the orders and rules of this Court regulating pre-trial procedure applicable to this case in numerous respects", and that the sum total of his conduct amounted to a failure to prosecute his claim with reasonable diligence. A motion by appellant for rehearing under Rule 60 (b), F.R. Civ. P. was overruled. The case is now before us on the whole question of whether the order was too drastic under the circumstances.

The order in question was entered after the appellant's proctor having the responsibility for trying the case failed to appear at a pre-trial conference. There was a background of that proctor's dereliction and failure to meet his responsibilities at every stage of this proceeding from the time issue was joined."

* * * *

(pages 887, 888)

"Dismissal of an action with prejudice and entry of judgment by default are drastic remedies which should be used only in extreme situations,[6] as the court has a wide range of lesser sanctions.[7] These rules are applicable to admiralty proceedings.[8]

[6] This Court, while recognizing and enforcing the exercise of the power of final disposition of litigation as a sanction in some cases,[9] has adopted the view that such action is too harsh except in extreme circumstances. It has generally followed the more modern tenor appearing in the following quotation from the opinion in the recent case of Durham v. Florida East Coast Ry. Co., 385 F. 2d 366,

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[Footnote 7 by the Court] Woodham v. American Cystoscope Company of Pelham, N. Y., 5 Cir., 335 F.2d 551, 556 (1964). See also: Annotation: Dismissal of Action for Failure or Refusal of Plaintiff to Obey Court Order, 4 A.L.R.2d 348; Waterman, An Appellate Judge's Approach when Reviewing District Court Sanctions Imposed for the Purpose of Insuring Compliance with Pretrial Orders. 29 F.R.D. 420 (1961); Rosenberg, Sanctions to Effectuate Pretrial Discovery, 58 Col.L.Rev. 480 (1958); Comment, Sanctions at Pre-Trial Stages, 72 Yale L.Jour. 819 (1963); 3 Moore, Federal Practice, 2d ed. pp. 1129-1130.

where Judge Wisdom, after recognizing the inherent power now under discussion, said: " * * * The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff * * * " Other cases by this Court emphasizing the importance, except in the most flagrant circumstances, of resorting to sanctions that do not deprive a litigant of his day in court are Woodham v. American Cystoscope Company of Pelham, 5 Cir., 335 F.2d 551 (1964), and Council of Federated Organizations v. Mize, 5 Cir., 339 F.2d 898 (1964). We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of lesser sanctions which it may impose upon the litigant or the derelict attorney, or both. The inherent power of a court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.[10]

* * * *

(page 889)
"We are conveinced that the above trial judge was more than patient under the circumstances, but we feel that he erred in imposing the drastic sanctions upon the innocent litigant resulting in termination of the litigation adversely to him. * * * There was no indication that the appellant's claim was vexatious or fictitious. The admitted delay was not so long drawn out as to indicate a desire not to prosecute."

This Court should interpret the provisions of Rule 60 (b) of the F.R.C.P.

It is respectfully submitted that Rule 60 (b) constitutes a remedial procedure and should be liberally construed.

When all the prerequisites for relief under Rule 60 (b) are present as were in the case at bar, it is an abuse of discretion to deny the relief provided for by the provisions of that Rule.

The decision by the Court below merits review as it unjustly affects every attorney having two or more cases for trial at the same time and said decision is in clear and unquestionable conflict with the decision by the United States Court of Appeals for the Fifth Circuit in *Flaksa v. Little River Marine Construction Co., supra.* All litigants are also affected as they are in jeopardy of being denied their day in court on the merits in the interests of expediency of reducing calendar congestion and being relegated to a questionable malpractice action in place of a meritorious cause of action.

CONCLUSION

The briefs in opposition are based on sophistry, contain no support in fact or law and does violence to the interests of substantial justice.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner

Supreme Court, U.S.
FILED
JUL 15 1970
E. ROBERT SEAVER, CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1969
No. 1548

JOSEPH MAIORANI,

Petitioner,

-against-

KAWASAKI KISEN K.K., KOBE,

Respondent,

-against-

PITTSTON STEVEDORING CORPORATION,

Respondent.

ON PETITION TO REHEAR PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CASES CITED

Peterson v. Term Taxi Inc., etc. United States Court of Appeals for the Second Circuit Docket Number 33352 ... 2

RULE CITED

Supreme Court Rule:

58 (2) 1

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969
No. 1548

JOSEPH MAIORANI,

Petitioner,

against

KAWASAKI KISEN K.K., KOBE,

Respondent,

against

PITTSTON STEVEDORING CORPORATION,

Respondent.

PETITION TO REHEAR PETITION FOR WRIT OF CERTIORARI TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Justices of the Supreme Court of the United States:

Petitioner respectfully petitions this Court to rehear his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, pursuant to subparagraph 2 of Supreme Court Rule 58, the said petition having been denied on June 23, 1970.

The basis for the original petition for a writ of certiorari was that the decision by the Hon. Lloyd F. MacMahon, United States District Judge, established a principle of law which is a radical departure from well established and uniform law under the circumstances involved.

Petitioner was denied his day in Court on the merits by having his complaint dismissed on the basis of failure to prosecute.

Denial of the motion to vacate the dismissal was affirmed by the Court below.

In the original petition for a writ of certiorari, it was pointed out that such decision was in conflict with the holdings in decisions in other comparable matters by other Federal Appellate Courts.

On June 4, 1970, Richard A. Petersen was granted the very relief by the Court of Appeals for the Second Circuit which had been denied by the said Court under identical circumstances to petitioner.

It thus appears that there is no uniformity of decision.

Richard A. Petersen was granted relief denied to petitioner and it is for this reason that deponent feels justified in presenting this petition for rehearing of the petition of Joseph Maiorani to the end that he be afforded the same protection of the law as the Court below granted in the case of *Peterson v. Term Taxi*, United States Court of Appeals for the Second Circuit (Docket Number 33352, not officially reported as yet) (copy of opinion annexed).

The decision in the Peterson case constitutes a substantial intervening factor which arose subsequent to the filing of the original petition herein and clearly demonstrates inconsistency in granting relief to one litigant and denying it to another under identical circumstances.

WHEREFORE, petitioner respectfully prays for rehearing of his petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit and further prays that, on such rehearing, this Court will grant the writ.

Respectfully submitted,

JACOB RASSNER,
Counsel for Petitioner.

CERTIFICATE

The undersigned certifies that this petition is not made for the purpose of delay, that it is restricted to the purposes set forth in Supreme Court Rule 58 and it is presented in good faith.

JACOB RASSNER,
Counsel for Petitioner.

EXHIBIT I

UNITED STATES COURT OF APPEALS
For the Second Circuit

No. 591—September Term, 1969.

(Submitted March 17, 1970 Decided June 4, 1970.)

Docket No. 33352

Richard A. Peterson,

Appellant,

-against-

Term Taxi Inc. (sued herein as Terminal Taxi Inc.), John Diaz and Miriam Hayes,

Appellees.

Before:

Moore and Feinberg, *Circuit Judges;*
Bonsal,* *District Judge.*

Appeal from dismissal for failure to prosecute of a diversity action for negligence by the United States District

---

* Of the Southern District of New York, sitting by designation.

Court for the Southern District of New York, Lloyd F. MacMahon, *Judge*, and from refusal by Judge MacMahon to grant plaintiff's motion to set aside the default judgment.

Reversed.

David B. Ampel, New York, N. Y. (Ronald S. Goldfarb and Arthur Greenberg, New York, N.Y., on the brief), *for Appellant.*

Nathan Cyperstein, New York, N.Y., *for Appellees, Term Taxi and John Diaz.*

Julius Diamond, New York, N. Y. (Joseph M. Costello, New York, N. Y., of counsel), *for Appellee, Miriam Hayes.*

Per Curiam:

This action was brought by Richard Peterson for damages arising out of personal injuries he allegedly sustained from a collision involving a taxicab owned by Term Taxi, Inc., in which he was a passenger, and an automobile driven by the defendant Miriam Hayes. Defendant John Diaz was the operator of the taxi in which Peterson was riding. The collision occurred on January 12, 1965. Peterson commenced his action on October 19, 1965, and one year later it was placed on the trial calendar.

The case appeared on the Ready Calendar in late January, 1968, and was subsequently assigned to Judge

MacMahon for trial along with 24 other cases on May 20, 1968. Commencing May 28, 1968, it appeared in the New York Law Journal as No. 15, accompanied by a notice that the cases would be tried, one to follow the other in the order listed.

On June 3, 1968, the deputy clerk of the district court telephoned counsel for all of the parties to this action and alerted them to be ready for trial at any time. Counsel appeared on June 6th to discuss a possible settlement, but the conference was to no avail. The deputy clerk thereafter telephoned counsel on June 11th, notifying them that the case would probably be reached for trial on June 12th or shortly thereafter. On the date of the settlement conference, plaintiff's counsel submitted to the court his trial memorandum and requests to charge.

The deputy clerk telephoned counsel for all parties on Friday, June 14th, to inform them that the case would definitely come on for trial at 10:00 a.m. on Monday morning, June 17th. By affidavit, plaintiff's attorney states that he received the clerk's call at approximately 2:15 or 2:30 p.m. on Friday. The significance of this timing will become evident shortly.

On Monday morning, as the deputy clerk had promised, the case was called at 10:00 a.m. Plaintiff was not in court, nor was his attorney. A call from the deputy clerk brought into court shortly thereafter attorney Seymour Berger, an associate of Fred Peters, Esq., whom plaintiff had previously designated as trial counsel. Mr. Berger represented to the court that the plaintiff could not be located, and he asked for an adjournment. Thereupon defendants moved for dismissal, the court declared plaintiff in default, and the same day a judgment of dismissal was entered, on the ground that the

plaintiff had "stated that he was not ready to proceed to trial...." Plaintiff himself arrived in the empty courtroom less than an hour after he had been declared in default.

Following the entry of judgment, plaintiff filed a motion to set aside the default, vacate the judgment and restore the case to the trial calendar. In support of the motion, affidavits were filed by plaintiff, by his attorney of record David Ampel, and by Berger, the representative of trial counsel who had appeared in court on the morning of the 17th.

According to the affidavits, plaintiff had been ready and available to go to trial at all times from the date of the aborted settlement conference until mid-afternoon on Friday, June 14th. On that Friday morning plaintiff called his attorney of record, Ampel, to inquire about the progress of the case. He was informed that no word had come from the clerk's office setting a specific date or time for trial. Plaintiff received the same information when he called again at noon. He called Ampel's office once more at approximately 2:00 p.m. The attorney was at lunch, but the secretary reported to plaintiff that there was still no word from the clerk's office. Shortly thereafter, plaintiff boarded a plane for St. Louis, en route to what was described in his affidavit as an emergency business conference. At 2:15 p.m. Ampel was back in the office, and at that time received the call from the deputy clerk informing him that trial was set for 10:00 a.m. on Monday. Ampel immediately called plaintiff's New York office, where plaintiff had previously arranged to be contacted, to discover that plaintiff had just left for St. Louis. Over the weekend, Ampel made numerous attempts to reach plaintiff's home in Pennsylvania, hoping to find out where in St. Louis he could communicate with plaintiff. Plaintiff's family were out of town for the weekend, and no contact was made.

Having been unable to reach plaintiff by Sunday evening, Ampel called Berger to explain the situation. Arrangements were apparently made for Ampel to call Berger when he heard from plaintiff, and that Berger should hold himself available the following morning, awaiting the call from Ampel.

On Monday morning, the day set for trial, plaintiff caught an early morning plane from St. Louis which arrived at LaGuardia airport at 11:00 a.m. He immediately called Ampel's office, where he was informed that trial had been set for 10:00 that morning and instructed to go directly to court. Plaintiff arrived in the courtroom at noon, to find his case dismissed.

According to the affidavits, plaintiff attempted to telephone Ampel at his home on Sunday afternoon. Ampel was away from home most of that day, celebrating his 27th wedding anniversary with his wife and family. He in turn made several attempts to reach plaintiff at home, but to no avail.

When the case was called on Monday, and no one appeared for plaintiff, the deputy clerk called first Ampel's office and then the office of Fred Peters. There he contacted Berger, who appeared in court at 11:00 a.m. Some confusion obviously existed between plaintiff's attorneys, for although Ampel's office had been continuously in contact with plaintiff from June 6th until 2:00 p.m. Friday, June 14th, Berger represented to the court on Monday morning that "Mr. Ampel has been trying to contact the plaintiff from the time he left the conference room in this courthouse—[June 6th]—until as of last night when he called me at 7:30 at home." Upon that representation, Judge MacMahon ordered the entry of judgment by default. Plaintiff's subsequent

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motion to vacate the judgment and restore the action to the calendar was denied, the court stating that

> "[i]f counsel and litigants observe the rules and heed the directions of the court, perhaps we will make progress toward the ideal of current calendars. That goal will never be reached if we allow counsel and litigants to trifle with the rules and the court's directions, as was so plainly the case here."

It is well settled that an order of dismissal for failure to prosecute should not be reversed except for an abuse of discretion. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962); *Schwarz v. United States*, 384 F.2d 833 (2d Cir. 1967); *West v. Gilbert*, 361 F.2d 314 (2d Cir.) *cert. denied*, 385 U.S. 919 (1966). A motion to vacate the judgment of dismissal pursuant to Rule 60(b), F. R. Civ. P., is also addressed to the discretion of the court and will not be disturbed on appeal in the absence of an abuse of discretion.

In *Schwarz v. United States*, *supra*, we declined to find an abuse of discretion in a dismissal on grounds similar to those here where the trial court was "completely satisfied that the plaintiff's case was never prepared for trial and that counsel for the plaintiff never had any intentions to try it on the day that was set...." 384 F.2d at 835. In *Schwarz* we noted that "no steps taken to get ready are shown. No depositions were ever taken, or interrogatories served on prospective witnesses, in the five years the case was pending.... Under the circumstances, we cannot say that the remedy of dismissal of this five-year-old action was an abuse of discretion." *Id.* at 836. Nevertheless, we suggested "that the court keep in mind the possibility, in future cases of inexcusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal."

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None of the circumstances leading to our conclusion to affirm in *Schwarz* were present in the case at bar. There is every indication that counsel was ready for trial and would have proceeded had plaintiff himself been in court. Interrogatories had been served, and counsel had submitted his trial memorandum along with requests to charge eight days before the case actually came on for trial.

The facts surrounding the dismissal on Monday morning are somewhat confused,[1] but two facts appear which could justify the trial court's initial reaction. Although plaintiff's counsel was advised on Friday afternoon that the case would commence at 10:00 a.m. on Monday morning, plaintiff himself was not in court at the appointed time. Second, Berger's representation in court that Ampel had been unable to locate his client since the settlement conference perhaps supported a conclusion at that time that the plaintiff may have abandoned his action.

However, the affidavits submitted with the motion to reopen the case and vacate the default judgment make it clear that plaintiff was prepared to appear for trial at all times except for the two-hour period on the morning of Monday,

---

[1] Affidavits submitted by Seymour Berger and Harold L. Schwartz offer conflicting accounts of what occurred by telephone between the clerk's office and Mr. Ampel's secretary. Mr. Berger claims that the secretary informed the deputy clerk of plaintiff's arrival at the airport and his availability for trial during a conversation initiated by the clerk at approximately 11:00 a.m. Monday morning. The Schwartz affidavit reports an interview with the deputy clerk, in which knowledge by the clerk of the plaintiff's availability at that time was denied. Neither the secretary nor the clerk was personally sworn or deposed, and we have not considered the portions of the affidavits relating to their conversation in rendering judgment on this appeal.

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ıne 17th, the date set for trial at 2:15 p.m. the preceding riday. There is no indication that counsel was not prepared) try the case, nor any indication that further delay would ave ensued once plaintiff arrived at noon.

In his opinion denying the motion pursuant to Rule 0(b), the trial judge found it "inconceivable that counsel ould allow his client to leave town in the circumstances ithout first obtaining permission from the court." The ffidavits in support of the motion show, however, that mpel did not allow the plaintiff to leave town, but that laintiff, correctly believing that trial had not been set, left own for the weekend without consulting his attorney. ertainly it was improper for plaintiff to absent himself from ıe jurisdiction over the weekend without clearing it with his ttorney and the court, but other penalties short of dismissal ere available to the court. Moreover, the trial judge haracterized this situation as "plainly ... a case where laintiff's counsel have taken on more business than they can roperly handle, as is demonstrated by their failure to set up line of communication between them and their client...." rom the explanation advanced by way of affidavits, it ppears to us that plaintiff rather than counsel was esponsible for the inability to contact him, albeit the ttorneys were less than diligent in their communication mong themselves.

The trial court concluded that "both plaintiff and his ounsel were palpably at fault and must suffer the onsequences." We agree that these facts demonstrate a failure f good judgment on the part of both, and their conduct on londay morning was an affront to the court. Nevertheless, nposition of the most "drastic remedy" available to the ourt was not justified by these circumstances. We recognize ıat the trial judge must have the power to control his

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docket, and that adjournments, postponements and the rescheduling of cases contribute to the serious calendar problem existing in the Southern District of New York. "Since the trial judge must be entrusted with the power to alleviate calendar congestion, we shall not put obstacles in his way when he exercises his judgment wisely in achieving the desired goal." *Davis v. United Fruit Co.*, 402 F.2d 328, 331-332 (2d Cir. 1968); *Winston v. Prudential Lines, Inc.*, 415 F.2d 619, 620 (2d Cir. 1969). Nevertheless, as we said in *Davis, supra*, "a court must not let its zeal for a tidy calendar overcome its duty to do justice." 402 F.2d at 331.

We reiterate that "the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired." *Winston, supra*, at 621. The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such close inflexible attention to the docket. Whatever the merits of plaintiff's case may be, in our opinion justice requires that he be given a fair hearing on his claim. We therefore remand to the trial court for proceedings consistent with this opinion.

Reversed and remanded.

No costs.